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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH MENCHACA, Defendant and Appellant.	A125655 (Contra Costa County Super. Ct. No. 05-090014-2)

By an amended information filed in April 2009, the Contra Costa County District Attorney charged appellant Joseph Menchaca with possession of heroin for sale and possession of Vicodin for sale, with allegations of two prior convictions and having served a prior prison term. A jury convicted appellant of possession of heroin for sale; the court found true the prior conviction and prison term allegations[1] and sentenced him to six years in state prison: the midterm of three years for the possession for sale conviction and a consecutive three years for the prior drug conviction. Appellant challenges the admission into evidence of a prior criminal offense. We affirm.

[1] There were two prior convictions alleged pursuant to Health and Safety Code section 11370.2, subdivision (a), both for possession for sale violations, and one pursuant to Penal Code section 667.5, subdivision (b) for serving a prior prison term for a felony (possession for sale) and not remaining free for a period of five years of both prison custody and commission of an offense resulting in a felony conviction.

I. FACTS

A. *Stop, Arrest, Searches*

About 7:12 p.m. on the evening of December 5, 2008, Antioch Police Officer Brian Rose initiated a traffic stop on a Honda Civic driving on East 18th Street, a location known for drug trafficking. Veronica McCoy was driving; appellant was the passenger and owner. Officer Rose confirmed that appellant had a search clause.

Exiting the vehicle, McCoy seemed extremely nervous. Asked if she had weapons or illegal items, McCoy said "I've got some dope on me." A search of her person revealed three plastic baggies of heroin (weighing, respectively, 27.02 grams, 5.87 grams and 0.06 grams), one of methamphetamine, a cell phone and $416 in various denominations. The search of appellant revealed 20 empty plastic baggies—the same that contained the drugs on McCoy—and a cell phone.

Officer Rose arrested McCoy and appellant and placed them in his patrol car. He digitally recorded appellant say, "[T]hey're about to find the scale." McCoy responded, "[D]on't worry about it, I'll tell them that the scale is mine." Appellant's response was: "[I]f that's what you want to do."

Searching the Honda, Officer Rose recovered another cell phone in the driver's door storage panel; Officer James Stenger found a digital scale under the center console and many baggies in the front passenger door panel. Fifteen Vicodin pills were found on McCoy's person pursuant to a booking search.

Appellant admitted to Officer Rose that the cell phone was his, but denied any knowledge that McCoy had drugs or was selling drugs and denied knowledge of the scale. However, appellant said that even if he did know, he would not tell them. Appellant had no explanation for the baggies.

B. *Message Retrieval*

Officer Stenger checked the inbox on appellant's cell phone and retrieved the following text messages:

1. "Can your girl get a little front until tomorrow? Check was overnighted today and got confirmation of that too."

2. "I got all but 20. A little left and will need more. Let me know what's up with it."

3. "Hey, 25 left. Will need more."

4. "What's up? Are you alive? I got your money. I need more. I have been turning people away. Yeah, like that so let me know ASAP."

Officer Stenger also found one sent text message: "Yeah. Sold half of everything. Thinking of recouping."

The officer found similar messages on McCoy's phone.

Appellant's cell phone rang at the police department while in Officer Stenger's possession. He answered and the following exchange took place:

Officer: "What's up?"

Caller: "[Is this] Joe?"

Officer: "Yeah."

Caller: "I need to score 25. That's all I can get."

Officer: "You need to give me 20 to 25 minutes before I can get there."

Caller (upset): "Are you serious?"

Officer: "Why? Are you sick?"

Caller: "Yeah, man. I've been sick all day. Can you make it faster?"

Officer: "I'll get there when I can."

Caller: "I'm at John's. Meet me there."

Shortly thereafter, Officer Stenger received a text message on appellant's phone having to do with money owed to appellant; Officer Stenger engaged in the message exchanges.

C. *Expert Opinions Concerning Possession for Sale*

Officer Stenger and a district attorney's inspector expressed their expert opinions that the heroin and Vicodin were possessed by appellant and McCoy for sale. Stenger testified that "it's not uncommon for a male and female that actually are having a relationship to work in concert to sell drugs," and it would be typical for one member of the team to hold the majority of the contraband so that person could take the blame for

possession. Commenting on a hypothetical based on the facts of the case, the inspector explained that there was an active distribution going on, with two people working in concert to distribute drugs. The driver was controlling the drugs because the passenger had a search clause and had been in trouble before.

D. *Testimony Regarding other Criminal Activity*

Pleasant Hill Police Officer Drew Sanchez testified that he initiated a traffic stop on appellant's vehicle on October 3, 2006. Appellant was driving. The officer searched him pursuant to a search clause, finding a small digital scale in appellant's shorts pocket, and methamphetamine packaged in two baggies in the car. Appellant admitted the drugs were his, saying he obtained them from "Wilson." He planned on selling some of the methamphetamine so he could pay what he owed Wilson, and keep some for personal use. Further, he used the scale to weigh the drugs for selling. Officer Sanchez arrested appellant at that time.

E. *Defense*

McCoy testified that she was using the scale and baggies to sell the heroin in her possession; appellant was not involved in the drug sales. McCoy had been selling drugs for about two years. She pleaded guilty to possession of heroin for sale because she was guilty, not to protect appellant. She did not tell appellant about the drugs she had in her pocket. McCoy possessed the Vicodin pills for her personal use; she used them when she was sick and did not have heroin.

McCoy and appellant were dating at the time of the stop. Earlier that day they were visiting a friend. When they left she drove because appellant had been drinking. McCoy had a box of baggies in her purse that spilled out into the car; she picked them up and put some in the armrest; a few remained on the floor. Originally the scale was in McCoy's purse. She hid it in the console because she did not want appellant to see that she had it. He was already upset about the baggies, fearing he could get in trouble.

II. DISCUSSION

During in limine motions, appellant moved to exclude the testimony by Officer Sanchez of his prior arrest. The trial court concluded the evidence was relevant to the

issues of intent and knowledge, and that its prejudicial effect did not outweigh its probative value. Appellant is adamant that we must reverse his conviction because the court erred prejudicially in admitting this evidence. We disagree.

Evidence Code[2] section 1101, subdivision (b) permits the admission of evidence of past criminal acts when relevant to prove a material fact at issue in the case such as motive, opportunity, intent, or knowledge, but not to prove a defendant's disposition or character to commit such an act. Because prior criminal acts may be prejudicial, the court must weigh the probative value of the proffered evidence against the probability that its admission would create a substantial danger of undue prejudice, confusing the issues, or misleading the jury (§ 352.) For example, in drug prosecutions, evidence of prior drug offenses generally is admissible under section 1101, subdivision (b), to show that the drugs were possessed for sale rather than for personal use; to prove guilty knowledge of the narcotic contents of the drugs; and to demonstrate intent to sell. (*People v. Williams* (2009) 170 Cal.App.4th 587, 607; *People v. Pijal* (1973) 33 Cal.App.3d 682, 691.)

Appellant maintains that his possession of methamphetamine for sale in October 2006 had no " 'tendency in reason' " to prove knowledge of the narcotic nature of the drugs, or that they were possessed for sale and not personal use. On the contrary, appellant asserts his defense was that McCoy possessed the drugs and he had no knowledge of her possession.

As the People point out, appellant could have been found guilty not only as a joint possessor, but also as an aider and abettor to McCoy's drug sales. Under this theory, the key issues were whether appellant knew she was selling drugs, and whether he intended to aid her sales by, for example, allowing her to use his car and driving with her to connect with buyers. Appellant's prior arrest while possessing methamphetamine packaged in plastic baggies and a scale was probative of his knowledge concerning McCoy's illegal activities. McCoy did not and could not challenge the fact that appellant

[2] All further statutory references are to the Evidence Code.

knew she possessed many empty baggies while driving his car in a drug trafficking area, and knew what the baggies were used for. Thus, the fact of his prior arrest was relevant to negate her assertion that appellant was in the dark about what she intended to do with the baggies and had no knowledge she was selling drugs.

Appellant also assails the admission of the evidence under section 352 as inherently prejudicial. Arguing that the jury apparently believed McCoy that that the Vicodin pills were hers and maintained for her personal use, the purported erroneous admission of the other crime served as evidence of his bad character and predisposition to criminality, and "that was the difference." Further, the text messages retrieved from the cell phone in appellant's possession were undated, and no records were produced showing how long appellant had owned the phone or even if it belonged to him. Nor were specific drugs mentioned in the messages or conversation. Thus, according to appellant, but for admission of evidence of the other drug offense, the messages and conversations which Officer Stenger opined were all about drug sales would have no context, "leaving their meaning debatable at best."

First, we do not accept the entire substance of appellant's argument. The jury could also have decided that 15 Vicodin pills were not enough to possess for sale, or, believing that McCoy was a drug user, that she did keep them for her use but that she and appellant were jointly involved in the sale of heroin. As to the text messages and conversation, appellant's argument about their meaning lacks any persuasive power.

Second, and more importantly, appellant's argument is premised on an erroneous concept of prejudice. The operative test "evaluates the risk of '*undue*' prejudice, that is, ' "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues," ' not the prejudice 'that naturally flows from relevant, highly probative evidence.' [Citations.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) To reiterate, the evidence of appellant's arrest for selling methamphetamine packaged in plastic baggies was relevant to counteract McCoy's claim that notwithstanding appellant's awareness that she was equipped with multiple plastic

baggies in his car, he did not know she was selling drugs. The prior bad act was not of a nature that would evoke emotional bias against appellant. Indeed, it was not any more powerful or inflammatory than the evidence concerning the charged offenses. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) The trial court did not abuse its discretion in admitting the one incident under section 1101, subdivision (b).

Further, we note that the trial court properly instructed the jury on the limited purpose for which the evidence of the prior offense could be used. We presume the jury understood and followed these instructions. (*People v. Williams, supra,* 170 Cal.App.4th at p. 607.)

III. DISPOSITION

The abstract of judgment is ordered corrected to reflect that the three-year enhancement is under Health and Safety Code section 11370.2, subdivision (a). In all other respects the judgment is affirmed.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Sepulveda, J.